

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996)	CC Docket No. 96-146
)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services and Toll-Free Number Usage)	CG Docket 04-244
)	
Truth-in-Billing and Billing Format)	CC Docket 98-170
)	
Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards)	RM-8783
)	
Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services)	ENF 95-20
)	

**REPLY COMMENTS OF
THE TEXAS OFFICE OF PUBLIC UTILITY COUNSEL**

November 29, 2004

The Texas Office of Public Utility Counsel (TOPC)¹ submits these comments in reply to comments filed in response to the Notice of Proposed Rulemaking and Memorandum Opinion and Order (“NPRM”) released by the Federal Communications Commission (“Commission” or “FCC”) on July 16, 2004.²

TOPC agrees with the comments provided by the National Association of State Utility Consumer Advocates (“NASUCA”) and AT&T and urges the FCC to adopt their recommendations.

In the following pages TOPC will be replying to comments related to:

- A. Revenue sharing (Pilgrim’s comments at 39-42, Blue Audio, Inc., HFT, AT&T, and NASUCA at 18-20)
- B. Modem hijacking (Verizon’s comments, Iowa Utilities Board’s comments, Nasuca comments at 12-14, Pilgrim’s comments at 17)
- C. Enhanced Directory Assistance (NASUCA’s comments at 20-21, Metro One Telecommunications, Inc.’s comments, Pilgrim’s comments at 22)

TOPC’s decision to limit its replies to the above issues does not mean it acquiesces with the remaining comments filed in this proceeding.

As TOPC’s reply comments will show, the current FCC rules in the area of audiotext information are in need of modification. Since the FCC’s promulgation of its rules, information providers have taken advantage of loop holes to circumvent the consumer protections established under the Commission’s rules. As a result of

¹ TOPC is a state agency created by the Texas Legislature to represent the interest of residential and small commercial consumers involving telephone and electric utility issues. Public Utilities Regulatory Act, Tex. Govt. Code Ann. Sec. 13.001. (Vernon 1998),

² FCC 04-162, 19 FCC Rcd 13461 (2004).

information provider-circumvention of the FCC rules, Texas consumers have been harmed and will continue to be harmed unless the current rules are modified.

A. Revenue Sharing

In response to the NPRM's request to address revenue sharing,³ HFT and Blue Audio found any restriction on revenue sharing would constitute constitutional free speech violations. Citing 47 U.S.C.A. Sec. 228(i) they further argued that revenue sharing does not constitute a violation of 47 U.S.C.A. Sec. 228 ("Sec. 228") because it falls outside the definition of pay-per-call services established by Congress in Sec. 228. Pilgrim also argues that Sec. 228 does not apply but acknowledges that revenue sharing involving a sham carrier should be regulated. While these entities agree that the services are information services, they are in effect arguing that a loop hole exists under the statute.

Both AT&T and NASUCA argue that Sec. 228 does apply. They note the Commission's reliance upon *Jefferson*⁴ in the NPRM does not address Sec. 228 issues, but a carrier's duty under 47 U.S.C.A. Secs. 201, 202. They also note that *Jefferson* does not address overrule the Sec. 228 analysis performed in the Marlowe letter⁵ by the FCC Common Carrier Enforcement Bureau.

The Marlowe letter correctly analyzes the applicability of Sec. 228 to revenue sharing. The subscriber⁶ is paying in addition to the costs of transport a fee in the form of

³ Revenue sharing is when a carrier shares a portion of its revenue with an information provider and the information provider does not charge any additional fees for its information services.

⁴ *In the Matter of AT&T Corp. v. Jefferson Telephone Co.*, FCC 01-243, Memorandum Opinion and Order (FCC August 31, 2001).

⁵ Letter from John Muleta, Chief of the Common Carrier Enforcement Bureau, to Ronald Marlowe, DA 95-1905, 10 FCC Rcd 10945 (September 1, 1995).

⁶ The FCC seeks comments on whether the persons (including entities) protected under Sec. 228 should include subscribers as well as calling parties. TOPC encourages the FCC to include subscribers as protected parties under Sec. 228. It is the subscriber, not necessarily the calling party, who has entered into

a commission to an information provider. As the Marlowe letter correctly noted, the transport charge is a sham. The Commission has viewed shams as an attempt to do indirectly what an entity is prohibited from doing directly. In determining a carrier violated 47 U.S.C.A. Sec. 201, the Commission acknowledged that a sham entity cannot be created to avoid regulation. *AT&T v. FCC, et. al.*, 317 F3d 227, 231 (D.C.Cir. 2003). Revenue sharing also creates a sham to avoid regulation and, as such, should be subject to the customer protections established by Sec. 228.

TOPC also notes that the Marlowe letter raised the issue of the Commission's regulatory authority under 47 U.S.C.A. Sec. 214. This statute conditions a carrier's certification by the FCC on a finding that the certification serves the public interest and convenience. Revenue sharing without the customer protections established under Sec. 228 constitutes anti-consumer and anti-competitive actions. The absence of these protections result in denying subscribers the right to contest the charges and to demand that the information providers phone numbers be blocked. Consequently, this Commission has additional statutory authority to require the consumer protections mandated by Sec. 228.

TOPC additionally notes that the FCC in *AT&T v. FCC* determined that revenue sharing can result in violations of 47 USCA Sec. 201 in situations involving sham

contractual arrangements with carriers. Consequently, it is the subscriber whose service would be terminated for non-payment of calls to information providers and who will be billed for these information services—particularly for information services provided under a revenue sharing agreement between carriers and information providers. Subscribers' rights are therefore substantially affected by information providers' and carriers' failure to follow the consumer protections under Sec. 228.

entities. *AT&T v. FCC* provides additional authority for this Commission to ensure the consumer protections under Sec. 228 apply to revenue sharing.⁷

TOPC's position that Sec. 228 applies to revenue sharing does not violate any first amendment rights. First amendment rights are not absolute and are subject to reasonable regulation. In this case, the FCC is not regulating content. The consumer protections established under Sec. 228 provide subscribers minimum protections against incurring economic harm (payment for information services the subscriber did not agree to, and the inability to block the information provider's call to prevent additional billings) and against harassment from information providers. While information providers have a right to provide information services, they should not be allowed to force subscribers to purchase that service without the subscriber's consent. But this is a consequence of exempting revenue sharing from the consumer protection provisions of Sec. 228. This does not promote the public interest. TOPC urges the Commission to apply the consumer protections under Sec. 228 to revenue sharing arrangements. TOPC also urges the Commission to rely upon Secs. 201 and 214 for additional authority.

B. Modem Hijacking

The NPRM seeks comments relating to modem hijacking which has become a serious problem resulting in substantial levels of unwanted telephone charges to consumers caused by fraudulent activity. While the FTC has acted on this activity, the FCC also has an obligation because it regulates carrier behavior which is a component to modem hijacking. As Verizon describes in its comments, the information provider receives revenues from carriers and does not individually charge subscribers. Modem

⁷ Assuming the Commission only relies upon Sec. 201 for its authority, the FCC could create a rebuttable presumption that a sham entity has been created. The burden of overcoming this presumption would be upon the Information provider.

hijacking is one of the most insidious forms of revenue sharing. The comments TOPC made in relation to revenue sharing apply here as well and TOPC refers the FCC to Section A above. These comments provide the basis for the FCC's authority to apply the consumer protections under Sec. 228 to modem hijacking.

While no commentator spoke in defense of modem hijacking, several commentators did provide recommendations. NASUCA recommended this Commission act under its authority under 47 U.S.C.A. Sec. 214. NASUCA also characterized modem hijacking as slamming on a call-by-call basis. Verizon recommended the FCC work with other agencies to prosecute and shut down scam operators. It is not clear whether Verizon is encouraging the Commission to prosecute under its own authority.⁸ Verizon also recommends that carriers be able to withhold settlement payments; and that the FCC facilitate a government, industry and consumer review panel. Lastly Verizon seeks expedited timelines for discontinuance of services and for complaint procedures relating to fraud. Pilgrim recommends that the FCC establish notice and acceptance requirements. Iowa Utilities Board recommends that the FCC block unauthorized calls from modems and also recommends that the FCC require information providers to obtain an online application and either issue passwords or PIN numbers to consumers who will to use the information service.

TOPC finds all the above recommendations reasonable and should be considered by this Commission for adoption.

⁸ Verizon at footnote No. 8 of its comments does concede that revocation of a carrier's Sec. 214 authority is a remedy the Commission may craft to address modem hijacking.

The consumer protections set out under Sec. 228 are minimum standards the Commission should adopt for activities resulting from modem hijacking. As noted in paragraph A, this Commission has authority not only under Sec. 228 but under Sections 214 and 201 as well. NASUCA recognized that modem hijacking also constitutes slamming on a call by call basis. TOPC agrees with NASUCA's characterization. TOPC joins NASUCA in encouraging the Commission to apply the consumer relief from slamming set out in the FCC's rules to modem hijacking.

C. Enhanced Directory Assistance

The NPRM requested comments on how directory services should be defined for purposes of the directory services exemption under Sec. 228. Metro One Telecommunications, Inc. ("Metro One") argued that adequate consumer protections currently exist that negate any need to define directory services. Pilgrim argued that defining directory services may be unnecessarily difficult."⁹ Pilgrim suggested that as long as adequate disclosures and verifications occur, directory services accessed from an 800 number should qualify as directory services exemptions under Sec. 228. NASUCA argues that directory services should be limited to traditional directory services such as operator provision of local telephone numbers or services using a 411 code. TOPC concurs with NASUCA.

Pilgrim's and Metro One's recommendation of extending the Sec. 228 directory services exemption to directory services using 800 numbers is not appropriate. Allowing this exemption to 800 numbers opens the door to abuses. TOPC would note that Metro One's affiliate Infone, LLC. utilizes 800 numbers for its EDA services. Metro One agrees that Infone can and does fulfill the Sec. 228 objectives of meeting the statutes

⁹ Pilgrim Comments at p. 22.

qualifying presubscription or comparable arrangements requirements. TOPC also encourages the FCC to monitor the use of the EDA services exemption to determine whether refinements in addition to NASUCA's recommendations should be made.

Respectfully submitted,

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